LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, PETITIONER,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JULY 16, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, PETITIONER,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE CALIFORNIA ELECTRIC POWER COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Original	Print
Proceedings in the Supreme Court of the State of California	1	1
Petition for writ of review	1	1
Points and authorities	6	4
Exhibit "A"—Application for rehearing filed before the Public Utilities Commission of the State of California in re the application of California Electric Power Company for an increase in rates	7	5
Answer of Public Utilities Commission of California to petition for writ of review	14	9
Answer of California Electric Power Company to petition for review	46	31
Reply to answers to petition for review	53	36
Order denying writ of review	57	38
Petition for rehearing of denial of petition for writ of review	58	39
Answer of Public Utilities Commission of California to petition for rehearing	62	41
Order denying petition for rehearing	70	46
Clerk's certificate (omitted in printing)	71	
Order extending time to file petition for certiorari	72	47
Order allowing certiorari	73	47

[fol. 1] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. ——

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondents

PETITION FOR WRIT OF REVIEW—Filed August 30, 1951

To the Honorable the Supreme Court of the State of California:

The Petition of the County of Mineral, State of Nevada respectfully shows:

I

That Petitioner is a political subdivision of the State of Nevada, and the owner of the Mineral County Power System, which is a public utility engaged in the sale of electrical energy to inhabitants of Mineral County.

II

That Respondent Public Utilities Commission is an administrative agency of the State of California.

III

That Respondent California Electric Power Company, is a corporation doing business in the sale of electric energy.

IV

That the California Electric Power Company, on August [fol. 2] 8, 1949, filed its first supplemental application No. 29791 before the Public Utilities Commission of the State of California to determine whether rate Schedule

P-3 was and had been since October 1, 1948 applicable to the sale of electric service to the Mineral County Power System, Mineral County, Nevada. Petitioner protested said application, appeared therein and is a party thereto.

V

That on July 3, 1951, Respondent Commission made and entered in said proceedings its order, (Decision No. 45913), in favor of Respondent Company "authorizing" Respondent Company to charge to and collect from Mineral County rate Schedule P-3 for service to said County.

Thereafter on July 19, 1951, Petitioner filed with Respondent Commission a Petition for Rehearing, setting forth the particulars in which your Petitioner alleges the Respondent Commission was in error.

That on July 31, 1951 Respondent Commission denied said application without hearing and without modification of its order theretofore entered, Decision No. 46004.

That a copy of said Petition for Rehearing is attached hereto, marked EXHIBIT "A", and by this reference made a part hereof.

VI

That on February 14, 1950 the Federal Power Commission issued and served on Respondent Company an Order to show cause why certain Findings and Orders should not be [fol. 3] made and entered against Petitioner, Federal Power Commission Docket No. 6269, in the matter of the California Electric Power Company; that hearings were held by Respondent Commission and the Federal Power Commission which hearings were part of the official proceedings of the cases before each of the commissions.

That on April 13, 1951, the Federal Power Commission made and entered in Docket E-6269 its order, Opinion No. 212, holding that the Federal Power Commission has jurisdiction over the terms and conditions of sale of electric energy by Respondent Company to said Mineral County Power System, Mineral County Nevada to which reference is made.

That on June 5, 1951, the Federal Power Commission denied applications for rehearing by both Respondents.

That on June 20, 1951, Respondent Company filed in the United States Court of Appeals for the Ninth Circuit a Petition to Review and Set Aside the Order of the Federal Power Commission contained in said Opinion No. 212, *California Electric Power Company* vs. *Federal Power Commission, No. 12987*, and on July 31, 1951, Respondent Company filed the Motion to Stay Order in said proceeding in the United States Court of Appeals.

VII

That your Petitioner avers in support of this Petition that the Respondent Commission in rendering its order and [fol. 4] opinion in the original proceedings, and in denying Petitioner's application for Rehearing, acted without, and in excess of its powers and jurisdiction and that said Opinion is unlawful.

Your Petitioner incorporates herein by reference its objections to said Opinion and Order as the same are set forth in its application for rehearing before said Commission, which same are set forth in full in EXHIBIT "A" hereof.

VIII

That your Petitioner has not the right to appeal from said Opinion and Order of said Commission and has no plain, speedy or adequate remedy other than by Writ of Review. That your Petitioner is a party beneficially interested in this proceeding, and the names of the parties interested whose rights will be affected by this Petition are your Petitioner and the Respondents herein.

Wherefore, Your Petitioner prays:

1. That a Writ of Review issue out of this Court to the said Public Utilities Commission commanding it to certify fully to this Court at a specific time and place the records and proceedings in said 1st Supplemental Application to Application No. 28791, and that the same be inquired into and determined by this Court.

2. That said matters and record be fully determined and considered by this Court, and that it be ordered, adjudged and decreed that said Order made by said Public Utilities

directed California Electric Power Company to charge certain electric rates to Mineral County Power System (the operating name for the County of Mineral, Nevada, in its proprietary capacity as the seller of electric energy at retail) for sales at Mill Creek, California, the energy to [fol. 16] be transported by Mineral County Power System from Mill Creek to Nevada for resale to retail customers in that state. The reason for *authorizing* rather than directing the imposition of rates in the case of the Navy lay in the fact that, pursuant to Public Utilities Act, Section 17(b) (now Public Utilities Code, Section 532), the Commission had, in 1942, issued a general order (General Order No. 96), providing in Section X-B thereof that an electric utility could, if it saw fit, furnish service to the United States and its departments at "free or reduced rates." Mineral County, on the other hand, does not come within the terms of such General Order.

The Commission's decision, authorizing rates in the case of the Navy and directing rates in the case of Mineral County Power System, was the result of two applications filed with the Commission by California Electric Power Company seeking to have the Commission determine whether an earlier general rate increase decision (Decision No. 41798 of July 1, 1948) should be construed to apply to the two types of sales in question. During the pendency of such applications, and after the first day's hearing thereon, it became apparent that the jurisdiction of the California Commission to make rate orders respecting the sales referred to hinged upon the proper interpretation of both the interstate commerce clause and the Federal Power Act. It was at that juncture that the Federal Power Com- [fol. 17] mission, having learned of the California Commission proceeding, decided to institute its own proceeding to inquire into the matter. In implementation thereof it issued an order to show cause against California Electric Power Company (FPC Docket No. 3-6269). By mutual agreement of the California and Federal commissions, a concurrent hearing was thereafter held in San Francisco. The effect of such procedure was to make the evidence adduced during the concurrent hearing equally a part of the

record in each of the two proceedings. The Legal Department of the California Commission entered an appearance at such concurrent hearing and argued by subsequent briefs that jurisdiction over the rates in question lay solely in the California Commission.

While the Federal Commission proceeding was instituted later than the California Commission proceeding, the Federal Commission was the first to issue an opinion. (FPC Opinion No. 212, issued April 13, 1951.) Such opinion, contrary to the Federal Examiner's proposals, asserted jurisdiction in the federal body, Commissioner Smith dissenting. A petition to have such Federal Commission order set aside was filed on June 21, 1951, by California Electric Power Company in the United States Court of Appeals for the Ninth Circuit. (U. S. Ct. of Apps., 9th Circuit, Docket No. 12987.) That review proceeding is now pending and the California Commission will seek permission [fol. 18] at the appropriate time to file an amicus curiae brief therein. On July 3, 1951, the California Commission issued its own decision, Decision No. 45913, holding that neither the interstate commerce clause nor the Federal Power Act precluded California Commission jurisdiction. It further held that its earlier general rate increase decision affecting California Electric Power Company (Decision No. 41798) should be construed to apply to the sales in question. Accordingly, it issued its order authorizing certain rates to be charged to the Navy and directing certain rates to be charged to Mineral County, as mentioned above. That is the decision here assailed by the United States (Navy Department) and Mineral County, Nevada.

It is conceded that petitioners have perfected their right to seek review here by exhausting the administrative remedy. Both filed petitions for rehearing which were denied. Public Utilities Act, Section 67 (now Public Utilities Code, Section 1756, Stats. 1951, ch. 764). It is further conceded that they are entitled to urge the several grounds presented by them to this Court because such grounds were urged in their respective petitions for rehearing. Public Utilities Act, Section 66 (now Public Utilities Code, Section 1732, Stats. 1951, ch. 764).

The grounds for review urged before this Court by the [fol. 19] United States (Navy Department) are as follows:

1. It was error for the California Commission to hold that the sales to the Navy are not in interstate commerce.

2. It was error for the California Commission to hold that the sales to the Navy even if held to be in interstate commerce are subject to the California Commission's jurisdiction.

3. It was error to issue a decision in square conflict with the Federal Power Commission's order in a proceeding in which the Legal Department of the Public Utilities Commission participated as a party and in which review proceedings are pending before the Court of Appeals for the Ninth Circuit.

4. It was error to construe the Commission's earlier general rate increase decision (Decision No. 41798 of July 1, 1948) as covering the sales by California Electric Power Company to the Navy and as authorizing the application of the company's Schedule P-2.

Mineral County urges the following grounds for review:

1. The California Commission acted in excess of its powers and jurisdiction.

2. It was error to issue a decision in square conflict with the Federal Power Commission's opinion.

3. The California Commission did not take cognizance of a certain provision in the Nevada laws.

4. The California Commission misconstrued Section 201(f) of the Federal Power Act.

An examination of the several grounds listed reveals one manifest misstatement on the part of each petitioner. The United States, in alleging in its Ground No. 1 that the California Commission erred in construing the sales to the Navy as not in interstate commerce, accuses the [fol. 20] California Commission of a position it has not taken. Nowhere in the decision does the California Commission express an opinion that the sales in question are or are not in interstate commerce. Mineral County in its

Ground No. 4 accuses the Commission of relying upon Section 201(f) of the Federal Power Act to exempt the sales in question. Nowhere in the decision does the California Commission rely upon such section or so much as mention it.

It follows that Ground No. 1 in the United States petition and Ground No. 4 in Mineral County's petition may be excluded from consideration. The remaining grounds will be dealt with in the argument which follows. It will be noted, as previously mentioned, that both petitioners challenge the jurisdiction of the California Commission to make the order it did. Furthermore, both petitioners allege that it was error for the California Commission to issue a decision in conflict with an opinion of the Federal Power Commission. The United States makes an additional contention, not shared in by Mineral County, to the effect that the California Commission misconstrued its own earlier rate decision. On the other hand, Mineral County makes an additional contention, not shared in by the United States, to the effect that the California Commission did not take full cognizance of certain provisions in the Nevada law.

We are convinced that the several contentions of the [fol. 21] petitioners are without merit. It will be the purpose of the following argument to present to this Court the cogent reasons dictating such conclusion.

Argument

I. Sales to the Navy. The California Public Utilities Commission Is Not Precluded from Exercising Jurisdiction Over the Rates Charged by California Electric Power Company for Sales of Energy to the Navy, Either Under the Interstate Commerce Clause or the Federal Power Act.

A. *Facts*

California Electric Power Company began selling electric energy to the Navy at Mill Creek, California, in 1943 pursuant to a contract for the sale of all energy required

by the government "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada." The energy is delivered to the Navy by the Company at the latter's Mill Creek generating plant. The Navy transmits such energy over a Navy-owned transmission line extending from the Mill Creek plant to the Naval Ammunition Depot at Hawthorne, Nevada. Thus, part of the transmission line is in California and part in Nevada. A large percentage of the energy furnished to the Navy is derived from hydroelectric plants operated by the Company pursuant to license as provided in Part I of the Federal Power Act. [fol. 22] The balance is derived by the Company from non-licensed sources in California. While over a long range period the greater part of the energy furnished to the Navy comes from licensed projects, there are moments when all or a portion of its comes from the non-licensed sources. The energy purchased by the Navy is consumed wholly at the Naval Ammunition Depot at Hawthorne, Nevada, which, in addition to the installations devoted directly to Naval use, includes the quarters for Naval personnel described as "public quarters" and the "Navy Low-Cost Housing Project" known as Babbitt, which provides living quarters and facilities for those civilians connected directly or indirectly with the Navy's activities on the reservation. The Navy makes a charge for electric energy furnished to those individuals residing in the "public quarters" or occupying premises for living or business purposes at Babbitt. Those who occupy living space in the "public quarters" and in Babbitt are tenants of the Navy and their lease agreements provide that the rental privilege ceases upon termination of employment by the Navy. Those who conduct business concessions at Babbitt are also tenants of the Navy and they occupy premises pursuant to a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot." The electric energy furnished these tenants in the "public quarters" and at Babbitt comes mainly from the supply purchased by the Navy at Mill Creek, though, on occasion, it

[fol. 23] comes from the Navy's own stand-by plants on the reservation.

It is believed the foregoing facts are not in dispute. It will be noted that they immediately raise certain basic problems:

1. Since the energy crosses a state line, is the sale by California Electric to the Navy in interstate commerce? If so, does the interstate commerce clause of the Federal Constitution preclude state jurisdiction, in the absence of federal statute? This latter question is of significance because it is arguable that, even if the sales be conceded to be in interstate commerce, the Federal Power Act does not apply to that part of the energy derived from non-licensed sources. Part I of that Act sets forth provisions applicable to "licensees" licensed under such Part, and it is arguable that California Electric is a "licensee" within the meaning of Part I only to the extent that it sells power from licensed projects. Part II of the Act, while possibly applying to electric sales regardless of whether the energy comes from licensed or non-licensed sources, regulates only sales for resale in interstate commerce, and we contend that Part II does not apply because the sales to the Navy are not for resale.

2. To what extent does the Federal Power Act apply? Since California Electric is a "licensee" under Part I, does that Part govern all sales by the Company, whether [fol. 24] the energy is derived from licensed or non-licensed sources? If the sales in question be construed to be sales for resale in interstate commerce, does Part II apply and, if so, should the language therein be construed to permit state jurisdiction? It will be the purpose of the discussion below to demonstrate that neither Part I nor Part II of the Federal Power Act presents any barrier to the exercise of jurisdiction over the sales to the Navy as undertaken by the California Commission. Such conclusion is reached whether it be assumed that Parts I and II of the Federal Power Act both apply or that only Part I or Part II applies. In this connection, the attention of the

Court is respectfully referred to the following decisions which shed some light upon the complexity of the problem:

Safe Harbor Water Power Corp. v. *FPC* (CCA, 3d, 1941), 124 F. 2d 800, cert. dnd. (1942), 316 U. S. 663, 86 L. ed. 1740.

Safe Harbor Water Power Corp. v. *FPC* (CA, 3d, 1949), 179 F. 2d 179, cert. dnd. (1950), 339 U. S. 957, 94 L. ed. 1368.

Consideration of the interstate commerce clause and the Federal Power Act follows:

B. *The Interstate Commerce Clause Does Not Preclude Jurisdiction by the California Public Utilities Commission*

Upon the facts as stated, the interstate commerce clause does not, we submit, preclude jurisdiction by the California Public Utilities Commission over the rates charged by [fol. 25] California Electric Power Company to the Navy. In *Public Utilities Commission* v. *Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, 71 L. ed. 549, P. U. R. 1927B 348, it was held in a case where no federal statute delineating state and federal jurisdiction was involved,[1] that a state cannot regulate the rates charged by a local electric utility for current sold to a foreign electric utility for resale in another state and delivered at the state boundary, inasmuch as the interstate business carried on between the two utilities is essentially national in character, and state regulation would constitute a direct burden upon interstate commerce, placing a direct restraint upon that which, in the absence of federal regulation, should be free. Even if it be assumed that the sales by California Electric Power Company to the Navy are in interstate commerce, regulation of the rates for such sales by the State of California is not precluded under the *Attleboro* case. That

[1] The Federal Water Power Act (1920, c. 285, 41 Stat. 1063, later incorporated as Part I of the Federal Power Act, 16 U. S. C. A., Sec. 792, et seq.) was in effect at the time of the *Attleboro* decision but was not applicable because the electric power in question was not derived from projects licensed by the federal government.

decision was based upon the proposition that the interstate commerce clause forbids state jurisdiction where a potential clash of state interests would arise from its exercise. Here, there can be no potential clash of state interests. Only one state, viz., California, is directly concerned, since Nevada has no jurisdiction over the Navy, either as to [fol. 26] the rates the Navy pays to California Electric or as to the rates the Navy charges its tenants. California's right to exercise jurisdiction arises only because it may regulate the rates of the seller California Electric, a California public utility. The purchaser of the energy, the Navy, is exempt from state jurisdiction. It is a department of the federal government; furthermore, it is not a public utility.

Another circumstance in support of the proposition that the interstate commerce clause does not preclude California jurisdiction is that the electric rates authorized by the California Commission are not rates which California Electric *must* charge the Navy. As stated heretofore, the Company is free, pursuant to Section 17 of the Public Utilities Act, as implemented by the Commission's General Order No. 96, to furnish electric service "at free or reduced rates" to a department of the United States Government.

The foregoing considerations make fairly plain that the California Commission's rate decision respecting sales to the Navy is not vulnerable as imposing an undue burden upon interstate commerce in violation of the Federal Constitution.

C. The Federal Power Act Does Not Preclude Jurisdiction by the California Public Utilities Commission

As indicated previously, this conclusion is reached [fol. 27] whether it be assumed that both Part I of the Federal Power Act (setting forth the provisions applicable where power from licensed projects is involved) and Part II (applying "to the sale of electric energy at wholesale in interstate commerce but . . . not . . . to any other sale") apply, or that either Part I or Part II applies.

1. *The Effect of Part I of the Federal Power Act.*

Turning first to Part I (derived from the Federal Water Power Act (1920, ch. 285, 41 Stat. 1063)), if it be assumed that the sales to the Navy are in interstate commerce, the applicable language is found in Section 20 providing, in so far as pertinent, that when:

> "said power or any part thereof [presumably any power furnished by a licensee] shall enter into interstate or foreign commerce the rates . . . and the services . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable . . . to the customer . . .; and whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this section within such state . . . or such states are unable to agree through their properly constituted authorities on the services . . . or . . . rates . . . jurisdiction is hereby conferred upon the [Federal] Commission . . . to regulate . . . so much of the services . . . and . . . rates . . . therefor as constitute interstate or foreign commerce . . ."

It will be observed that Congress has conferred jurisdic- [fol. 28] tion on the Federal Power Commission under Section 20 only if any of the states directly concerned has not provided a commission or other authority to enforce the requirements of Section 20 within such state "requirements" apparently referring to the provision that the rates and services by licensees or persons purchasing from licensees for resale in public service shall be reasonable), and, furthermore, even though the requisite state commissions or other authorities have been provided only if the states directly concerned are unable to agree on the service or rates through their properly constituted authorities.

Assuming that the language of Section 20 applies at all, it is clear, we submit, that under it, the sales to the Navy are excluded from Federal Power Commission jurisdiction. The California Commission is the kind of state "commission or other authority" contemplated by Section

20, for it has comprehensive power to regulate electric utility rates and service "within such state," viz., California. It has already been pointed out, in considering the interstate commerce clause, that California is the only state which can, because of its authority over California Electric, affect the sales to the Navy. Nevada cannot order the Navy to pay a certain rate for electricity purchased, nor can it order the Navy to charge a certain rate for electricity distributed. It follows that, since only one state is "directly concerned," no question can arise of inability as [fol. 29] between two states directly concerned to agree on the reasonableness of the rates charged to the Navy. Thus, Federal Power Commission jurisdiction is excluded because the two conditions to its exercise, as prescribed by Congress in Section 20, are absent.

2. *The Effect of Part II of the Federal Power Act*

Part II of the Federal Power Act (enacted as part of the Public Utility Act of 1935, ch. 687, 49 Stat. 803) declares in Section 201(b) that:

> "The provisions of this Part shall apply . . . to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . ."

In addition to this jurisdictional language it is provided in the policy declaration of Section 201(a) that federal regulation of the "sale of such [electric] energy at wholesale in interstate commerce is necessary in the public interest, such federal regulation, however, to extend only to those matters which are not subject to regulation by the states."

Putting aside the question whether the sales are in interstate commerce, it is clear that the sales to the Navy do not fall within the language "sale of electric energy at wholesale," which is defined by Section 201(d) to mean "a sale of electric energy to any person for resale." The sales in question are neither sales to a "person" nor are they sales "for resale."

The word "person" is defined by Section 3(4) of the [fol. 30] Act to mean "an individual or corporation." A "corporation" by Section 3(3) means:

> "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' . . ."

It is obvious that the Navy is not a "person" as defined. Not only is the Navy not a "person" but the sales to it cannot properly be described as "sales for resale." Reference has already been made to the contract entered into in 1943 whereby California Electric agreed to supply "all electric energy required by the Government . . . for use of the Government's Ammunition Depot . . ." The evidence showed that the use in fact made of the energy furnished is consistent with such language. All of the energy is consumed on the Naval reservation; part is used in the Depot's industrial operations or dissipated in system losses; the balance is used by the individuals and business establishments located on the government reservation. Individuals may reside or conduct business only so long as their presence is consistent with the Navy's obligations. The lease agreements with those occupying "public quarters" and with those occupying the low-cost housing project known as Babbitt, both provide that the rental privilege ceases upon termination of employment. For the [fol. 31] business concessions, the government issues a "Revocable Permit" reciting that the concession is "for accommodation of employees of the Depot."

It follows that the sales to the Navy are in effect for its sole use and not "for resale." It is true that, in supplying electricity to those living or conducting business at the reservation, the Navy is in a sense "reselling" energy purchased from California Electric Power Company, but it is clear that the term "sale for resale" in Part II of the Federal Power Act was intended by Congress to refer to a different situation. The courts have repeatedly pointed out that Part II was enacted to close the gap in utility regulation revealed by the *Attleboro* decision. See *Jersey*

Central Power & Light Co. v. *FPC* (1943), 319 U. S. 61, 87 L. ed. 1258, 63 S. Ct. 953. The Navy is certainly not a public utility. Even assuming that it would not be precluded from that status by virtue of its position in the federal government, it could not be deemed a public utility by virtue of furnishing electricity to tenants whose continued tenancy depends upon the needs of the Navy landlord.

Quite aside from the conclusion thus reached, that the sales to the Navy are not to a "person for resale" under Part II of the Federal Power Act, jurisdiction is denied the Federal Power Commission by the proviso clauses of Sections 201(a) and 201(b) of Part II. Section 201(a) declares that federal regulation shall "extend only to those [fol. 32] matters which are not subject to regulation by the States" and Section 201(b), in making Part II applicable to "sales at wholesale in interstate commerce," contains the proviso that Part II "shall not apply to any other sale of electric energy." Taking these sections together and construing them in the light of their statutory history, it is plain that Congress intended the Federal Power Commission to have jurisdiction only in that area where the United States Supreme Court had declared state regulation over sales could not be exercised because of the interstate commerce clause. See *Connecticut Light and Power Co.* v. *FPC* (1945), 324 U. S. 515, 89 L. ed. 1150, 65 S. Ct. 749. In the case presented here, it has already been pointed out that the interstate commerce clause does not apply to prevent state jurisdiction, and it has further been pointed out that the machinery set up by Congress in Section 20 of Part I to enable states upon certain conditions to exercise jurisdiction without burdening interstate commerce is available upon the facts shown and makes it possible for California to regulate the sales to the Navy. Thus, both under the Constitution and Part I of the Federal Power Act, California may exercise jurisdiction. Therefore, the provisos of Sections 201(a) and 201(b) in Part II operate to deny Federal Power Commission jurisdiction under Part II. It follows that there is nothing in Part II to prevent the exercise of California jurisdiction [fol. 33] over the sales in question.

II. Sales to Mineral County Power System. The California Public Utilities Commission May Properly Exercise Jurisdiction Over the Rates Charged by California Electric Power Company for Sales of Energy to Mineral County Power System. The Right to Exercise Such Jurisdiction Is Assured by the Terms of the Federal Power Act.

A. *Facts*

As previously noted, California Electric sells electric energy to Mineral County Power System at Mill Creek, California, and the latter transmits the energy over its own line to Nevada, reselling to local consumers in Nevada. As in the case of the Navy, the evidence indicates that, while a large percentage of the energy is derived from licensed projects, there are times when all or a portion of it comes from non-licensed sources.

B. *The Right of the California Public Utilities Commission to Exercise Jurisdiction Is Assured by the Terms of the Federal Power Act.*

Upon such facts, it is submitted that the right of the California Public Utilities Commission to exercise jurisdiction, even if the sales by California Electric be considered to be in interstate commerce, is effectively provided by the terms of the Federal Power Act. It is true that, unlike the situation with respect to sales to the Navy, regulation by California of the sales to Mineral County Power System might well, standing alone, be regarded as imposing an undue burden upon interstate commerce, for [fol. 34] the State of Nevada clearly has an interest in the cost of electricity to Mineral County Power System and the rates in turn charged by it to its customers. It is in this precise kind of situation, however, that the Federal Power Act, through the machinery set up in Part I, Section 20, makes possible the exercise of state jurisdiction under certain conditions where such exercise would not impose an undue burden on interstate commerce by jeopardizing the interests of a sister state.

It is submitted that Part II of the Federal Power Act does not apply because the sales to Mineral County Power

System are not to a "person" as defined. Even if Part II were construed to apply, however, the proviso clauses previously alluded to, in Sections 201(a) and 201(b) of Part II, operate to preserve the exercise of jurisdiction recognized in Part I.

Detailed consideration of the effect of Parts I and II of the Federal Power Act upon the exercise of California Commission jurisdiction over the sales to Mineral County Power System follows:

1. *The Effect of Part I of the Federal Power Act.*

By the terms of Part I, Section 20, two conditions must be present before states directly concerned may exercise jurisdiction: (1) such states must have commissions with authority to enforce the requirements of Section 20 within the state; (2) such states must not be unable to agree upon the rates to be charged. In the case of the sales to Mineral [fol. 35] County Power System, (1) each of the states directly concerned, viz., California and Nevada, *has* provided "a commission or other authority to enforce the requirements of this section within such state," and (2) such states *have not*, through their properly constituted authorities, been shown unable to agree on the rates for the sales in question.

Considering more specifically the first of these two conditions provided in Section 20, it cannot be seriously contended that the California Commission, entrusted as it is with very broad regulatory authority over the rates and service of utilities within the state, fails to qualify as "a commission or other authority to enforce the requirements of this section within such state." While the Nevada Public Service Commission does not exercise as great a degree of control over Mineral County Power System as it does over private organizations engaged in public service in Nevada, it nevertheless has express jurisdiction over Mineral County Power System's rates. Nevada Statutes of 1923 provide at page 55:

> "Sec. 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and

distribution of electric energy and current, and the tolls from telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of the Nevada Public Service Commis-* [fol. 36] *sion, who may revise, raise or lower the same.*" (Emphasis added.)

The quotation makes clear that the Nevada Public Service Commission is, with respect to Mineral County Power System's rates, "a commission or other authority to enforce the requirements of this section within such state."

The petitioners contend that, in order to qualify as "a commission or other authority to enforce the requirements of this section within such state," a commission must have authority not only to regulate the rates charged by a utility but the rates such utility pays for power purchased outside the state and transmitted in interstate commerce. It is claimed that the Nevada Commission does not qualify because it is not empowered to fix the rates Mineral County Power System pays to California Electric Power Company. Such contention has no merit. Surely, Congress did not contemplate state commissions with powers beyond those normally entrusted to them, powers which might indeed be found to be unconstitutional.

Turning to the second condition in Section 20, viz., that the states must not be unable to agree, there was no evidence whatever to indicate that California and Nevada "through their properly constituted authorities" were "unable to agree." No evidence whatever was offered respecting any course of dealing, or an absence thereof, between the California and Nevada commissions, or between any other authorities of the respective states. [fol. 37] The Chairman of the Nevada Public Service Commission stated at the concurrent hearing that his Commission had determined not to participate in the cooperative procedure and that he would appear only as an interested party. He further stated:

"The State of Nevada, therefore, is not interested except to the extent that the users are living in Nevada and, therefore, I will say that we are very much interested. I am not prepared to state at this time

what the position of our Commission would be, until after this matter of jurisdiction has been decided. That is all the statement I wish to make."

These words make apparent that there was no inability to agree, and that the Nevada Commission has adopted a neutral position.

It follows that, since neither of the circumstances prevailed upon which Federal Power Commission jurisdiction is conditioned under Section 20, jurisdiction could properly be exercised by the California Commission over the sales to Mineral County Power System.

See First and Second *Safe Harbor* cases, *supra*.

2. *The Effect of Part II of the Federal Power Act*

It was observed in discussing the sales to the Navy that Part II gives the Federal Power Commission jurisdiction only over sales "to any person for resale." The sales [fol. 38] to Mineral County Power System undoubtedly are "for resale" but they are not sales to a "person." Section 3(4) defines a "person" as "an individual or corporation." A "corporation" by Section 3(3) "shall not include 'municipalities' as herein defined." A "municipality" by Section 3(7) means "a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power . . ." Mineral County Power System, as we understand it, is the operating name for the County of Mineral in its proprietary capacity as the seller of electric energy at retail. Thus, it is a "municipality" as defined in Section 3(7) and, therefore, is excluded from the definition of a "corporation" in Section 3(3) and from the definition of a "person" in Section 3(4). It follows that Part II does not apply to the sales to Mineral County Power System.

Even if the sales to Mineral County Power System were to be regarded to be within the purview of Part II, the proviso clauses of Sections 201(a) and 201(b) apply. The views heretofore stated respecting them apply with equal force. Since by the provisions of Part I, Section 20, the

California Commission upon the facts may exercise jurisdiction, the proviso clauses in Part II operate to insure that jurisdiction by denying it to the Federal Power Com-
[fol. 39] mission.

We have developed at some length the reasoning underlying the California Commission's conclusion that it had jurisdiction to regulate the rates for the sales to the Navy and Mineral County Power System. We turn now to the second contention made by both petitioners, viz., that it was error to issue a decision in square conflict with the Federal Power Commission's opinion.

III. The California Public Utilities Commission Was Not Precluded from Rendering a Decision Based Upon Its Own Interpretation of the Federal Constitution and a Federal Statute Merely Because a Federal Power Commission Decision Taking a Contrary Position Was Currently Before a Federal Court of Appeals on Petition for Review.

Petitioners do no more than make the flat assertion that it was error for the California Commission to issue a decision in conflict with a Federal Power Commission decision currently under review. No reason is assigned for such position and no authorities are cited.

If petitioners mean to indicate that, where the construction of the Federal Constitution or a federal statute is in issue, a state tribunal must defer to a federal tribunal whenever a proceeding has been begun in the latter, they forget that the laws of the United States are as binding on citizens and courts as state laws. State tribunals have
[fol. 40] equal jurisdiction with federal tribunals to construe federal law and determine whether that law confers concurrent jurisdiction or exclusive jurisdiction upon one or the other of such tribunals. *Gerry of California* v. *Superior Court* (1948), 32 Cal. 2d 119. In *Grubb* v. *Public Utilities Commission of Ohio* (1930), 281 U. S. 470, 74 L. ed. 972, the United States Supreme Court said:

> "The appellant relies on the commerce clause as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of

> all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation . . . and is in conflict with the doctrine often sustained by this court that the states have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts."

The prior institution of proceedings in a federal tribunal does not preclude the state tribunal from construing federal law to determine whether or not that law confers jurisdiction.

Grubb v. *Public Utilities Commission of Ohio* (1930), *supra.*

Minneapolis & St. L. R. R. v. *Bombolis* (1916), 241 U. S. 211, 60 L. ed. 961.

Robb v. *Connolly* (1884), 111 U. S. 624, 28 L. ed. 542.

[fol. 41] The state court may not decline to exercise jurisdiction merely because it would be inconvenient or confusing to handle a case involving rights under a federal statute.

Gerry of California v. *Superior Court, supra.*

Mondou v. *New York, New Haven & Hartford R. R.* (1912), 223 U. S. 1, 56 L. ed. 327.

In the *Gerry of California* case, this Court said (32 Cal. 2d 119 at 122:

> "Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it."

The state and federal tribunals may proceed until a final judgment of one becomes conclusive on the other as *res adjudicata.*

Grubb v. *Public Utilities Commission, supra.*

In short, petitioners' contention is without merit.

IV. The California Commission Was Fully Warranted in Concluding That Its Earlier Rate Decision, Decision No. 41798, Should Be Construed to Apply to the Sales by California Electric Power Company to the Navy.

The United States contends that it was error for the California Commission to construe its earlier Decision No. 41798 as applying to the sales to the Navy. Such con- [fol. 42] tention to be meritorious would have to be based upon the premise that there was no evidence in the record in the earlier proceeding and no statement in the earlier decision itself which could reasonably form the basis for concluding that the sales to the Navy were intended to be covered in the rate order. Quite aside from the fact that the Commission is in the best position to know what it intended in issuing the earlier rate order, there was clearly ample evidence in the earlier proceeding to justify a rate order extending to the sales to the Navy, and, furthermore, the language of that earlier decision is reasonably susceptible of the interpretation given it. The Court's attention is respectfully invited to the discussion of this matter beginning at the bottom of Sheet 3 of Decision No. 45913 (the decision here under attack).

V. The Charge That the California Commission Did Not Give Full Recognition Or Effect to the Nevada Statutes Is Unwarranted.

Mineral County in its petition for a writ incorporates by reference its petition for rehearing, on page 2 of which it is contended that the California Commission did not give effect to the following language in the Nevada statutes:

> "Section 2. The board of county commissioners . . . shall have authority to enter into any and all necessary contracts with any person, firm or corporation, either with or without the State of Nevada, for the purchase of electric energy or current . . ."

[fol. 43] Mineral County contends that such language excludes the Nevada Public Service Commission from exercising jurisdiction over Mineral County Power System notwithstanding the language in Section 16, page 55 of Nevada Statutes of 1925 giving that Commission jurisdiction over the rates charged by the Power System. (See quotation from Nevada Statutes, page 22 above.) We are at a loss to follow the thread of petitioner's reasoning. It appears to be a *non sequitur*.

Conclusion

It is respectfully submitted that neither the United States nor Mineral County, Nevada, has shown cause for the issuance of a writ herein. Their petitions should, therefore, be denied.

It is submitted that this Court should, for the reasons previously given, act upon the petitions herein without awaiting disposition of the proceeding before the Court of Appeals for the Ninth Circuit.

Respectfully submitted, (S.) Everett C. McKeage, Boris H. Lakusta, Wilson E. Cline, Attorneys for the Public Utilities Commission of the State of California.

Dated: San Francisco, California, October 8, 1951.

[fol. 44] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18463

THE UNITED STATES OF AMERICA, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondents

S. F. No. 18464

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondent

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

GRACE E. HUNT, being first duly sworn, deposes and says:

That affiant is, and at all times herein mentioned was, a citizen of the United States over the age of twenty-one [fol. 45] years, and neither a party to nor interested in the above proceeding.

That on the 8th day of October, 1951, in the City and County of San Francisco, affiant personally deposited in the United States Mail copies of the within Answer to Petitions for Writ of Review, addressed to the following attorneys:

James R. Browning, Esq.,
Acting Asst. Attorney General,
Department of Justice,
Washington 25, D. C.

L. E. Blaisdell, Esq.,
County District Attorney,
Hawthorne, Nevada.

Henry W. Coil, Esq.,
c/o California Electric Power Co.,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That attorneys for the Public Utilities Commission have their offices in the City and County of San Francisco. That there is a regular communication by mail between the City and County of San Francisco, California, and Washington, D. C., Hawthorne, Nevada, and Riverside, California, respectively.

Grace E. Hunt.

Subscribed and sworn to before me this 8th day of October 1951. (S.) R. J. Pagalich, Secretary, Public Utilities Commission of the State of California. (Seal.)

[fol. 46] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ANSWER OF CALIFORNIA ELECTRIC POWER COMPANY TO PETITION FOR REVIEW—Filed October 8, 1951

California Electric Power Company, a corporation, Respondent above named, for answer to the Petition for Writ of Review, states:

I

This Respondent denies each and all of the allegations of paragraph VII of the Petition herein, including exhibit A thereto attached.

II

This Respondent avers that, as found by Federal Power Commission in its Order of April 13, 1951, mentioned in the Petition herein, this Respondent is a licensee under Part I of Federal Power Act (Secs. 1-29; 16 U. S. Code, Secs. 791-823) and holds licenses for five projects consisting of seven hydro-electric power plants located in Mono and Inyo

Counties, California, all of which Respondent owns and operates as a public service corporation and in developing, transmitting and distributing power for sale and use [fol. 47] in public service, and that part of the electric energy generated in each and all of said projects is sold and delivered to Petitioner at Respondent's Mill Creek Plant in Mono County, California, and is transmitted by Petitioner from said Mill Creek plant into Mineral County, State of Nevada, solely over and by means of a transmission line owned, maintained, and operated by the Petitioner between said points.

III

Section 19 of Federal Power Act (16 U. S. Code, Sec. 812) provides in effect that, as a condition of all such licenses, every licensee which is a public service corporation or corporation owning or operating any such project and developing, transmitting or distributing power for sale or use in public service shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power and of rates and charges of payment therefor as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case such State has not authorized or empowered a commission or other agency to regulate such services and rates, jurisdiction is conferred upon Federal Power Commission to exercise such regulation until such state shall have provided such Commission or authority for such regulation, and that such jurisdiction of Federal Power Commission shall cease and determine as soon as such state shall have provided such commission.

IV

The provisions of said Section 19 are expressly incorporated in each of this Respondent's said licenses and is a contractual arrangement between the United States and Petitioner founded upon an adequate consideration and [fol. 48] is immune from impairment under Amendment V to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of California.

V

The State of California has and, at all times herein mentioned, had authorized and empowered a commission (Public Utilities Commission, Respondent herein) within said State to regulate services and rates of this Respondent as provided in said Section 19 of Federal Power Act, and said Commission has, at all times herein mentioned, regulated this Respondent's services and rates in accordance with the Public Utilities Act of said State (Deering's G. L. Act 6386).

VI

Section 20 of said Federal Power Act (16 U. S. Code, Sec. 813) provides in effect that, when said power or any part thereof shall enter into interstate commerce, the rates charged and the service rendered by such licensee shall be reasonable, non-discriminatory and just, and that whenever any of the states directly concerned has not provided a commission or other authority to enforce the requirements of this Section within such State, or such States are unable to agree through their properly constituted authorities, jurisdiction is conferred upon Federal Power Commission to enforce the provisions of this Section and to regulate so much of services and rates as constitute interstate commerce.

VII

Section 6 of said Federal Power Act (16 U. S. Code, Sec. 799) operates so as to incorporate the provisions of said Section 20 of said Act as a contractual provision of all of this Respondent's said licenses, which is based upon an [fol. 49] adequate consideration and is immune from impairment under Amendment V to the Constitution of the United States and Sections 13 and 14 of Article I of the Constitution of California.

VIII

The States of California and Nevada are the only States which are directly concerned in the matters referred to in the Petition herein or in said Section 20 and each of said States has provided a Commission to enforce the provisions of said Section 20 within such states (Deering's G. L. Act

6386; Nev. Comp. L. 1929, Secs. 6100, et seq.), and there is no allegation in said Petition that said States are unable to agree as provided in said Section 20 of Federal Power Act.

IX

The rates of this Respondent referred to in the Petition herein are not subject to regulation by Federal Power Commission under Part II of Federal Power Act (Secs. 201-209; 16 U. S. Code, Secs. 824-824h) for the following reasons:

(a) The rate regulatory features of Part II of Federal Power Act (Secs. 201, 205 and 206; 16 U. S. Code, Secs. 824, 824d and 824e) do not apply to licensees under Part I of said Act for the reason that regulation thereof is vested in State Commission or Commissions under Sections 19 and 20 of said Act as contractual stipulations between the United States and the licensees, including this Respondent.

(b) Under Sec. 201 of Federal Power Act (16 U. S. Code, Sec. 824), Federal Power Commission has jurisdiction only over rates for the transmission of electric energy in interstate commerce and for the sale of energy at wholesale (for resale) in interstate commerce, and neither the rates [fol. 50] nor sales mentioned in the Petition herein are in interstate commerce as defined in said Sec. 201.

(c) Such sales are not sales in interstate commerce, for the reason that under Section 201(f) of said Act, none of the provisions of Part II of said Act apply to a state or any political subdivision, agency, authority or instrumentality of a state, and, hence, the definition of interstate commerce in Sec. 201(c) of said Act does not apply to the Petitioner herein, which is not and cannot be engaged in interstate commerce as defined in Part II of said Act;

(d) Such sales to Petitioner are not sales at wholesale as defined in Sec. 201(b) and (d) of said Act, for the reason that they are not made to a "person" as defined in Sec. 3(3), (4) and (7) of said Act.

X

Federal Power Commission has no jurisdiction of said rates or sales, for the reason that Sec. 201(b) of said Act

exempts therefrom rates and sales in local distribution and Petitioner is simply and only a distribution customer on Respondent's 55 kv system used in the local distribution of electric energy in Mono County, California.

Wherefore, this Respondent prays that the Petition herein be dismissed.

(S.) Henry W. Coil H. M. Hammack, Donald J. Carman, Kenneth M. Lemon, Attorneys for Respondent, California Electric Power Company.

[fol. 51] *Duly sworn to by G. C. Delvaille. Jurat omitted in printing.*

[fol. 52] STATE OF CALIFORNIA,
County of Riverside, ss.

RUTH WARREN, being first duly sworn, on oath deposes and says: that she is a citizen of the United States, a resident of the City of Riverside, County of Riverside, State of California, over the age of twenty-one years, and not a party to the within named cause; that affiant's business address is 3771 Eighth Street in said City of Riverside; that on the 28th day of September, 1951, affiant deposited in the United States mail in said City of Riverside, true copies of the within Answer, enclosed in sealed envelopes with all postage thereon fully prepaid, addressed, respectively as follows:

James R. Browning,
Acting Assistant Attorney General,
Washington, D. C.
Paul A. Sweeney, Attorney,
Department of Justice,
Washington, D. C.
Public Utilities Commission of California,
State Building,
San Francisco 2, California.
L. E. Blaisdell,
District Attorney,
County of Mineral,
Hawthorne, Nevada.

That there is a regular communication by mail between said place of mailing and said places so addressed.

Ruth Warren.

Subscribed and sworn to before me this 28th day of September, 1951. Leon S. Heseman, Notary Public in and for the County of Riverside, State of California. My Commission Expires August 3, 1953. (Seal.)

[fol. 53] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

REPLY TO ANSWERS TO PETITION FOR REVIEW—Filed October 29, 1951

The County of Mineral joins with the Public Utilities Commission in that part of its statement relative to the two petitions for review herein, which appears on lines 4 to 5 page 2 of its answer, namely, that

> "The same basic argument dominates both petitions, viz., that the California Commission was without authority to render the decision it did . . ."

However, the County of Mineral urges other reasons for that argument, in addition to those mentioned by the Commission, which follow:

All of the parties hereto participated in the proceedings before the Federal Power Commission which resulted in [fol. 54] the final decision of that Commission determining jurisdiction to rest with it, and denying jurisdiction to the California Commission. The California Electric Power Company has petitioned the Ninth Court of Appeals for a review of that decision, which is pending, and a stay order has been granted and is in effect. The California Commission has not so petitioned and, we contend, the decision of the Federal Power Commission referred to is *res adjudicata* as to the California Commission pursuant to Section 313 (a) of the Federal Power Act (16 U. S. C. 8251 (a)), since that Commission did file briefs and petition for re-

hearing complaint with its provisions. As a result, we urge, the California Commission was precluded from making its decision and orders in conflict with those of the Federal Power Commission.

Mineral County has petitioned this Court for a writ of review of the California Commission's decision on the theory that such action was necessary to safeguard its rights until the proceedings before the Ninth Court of Appeals has been finally settled. The County has been granted leave to intervene in that proceeding and intends to participate and follow through to a determination of the issues presented. We respectfully pray that this Court with-hold action on the petitions here under consideration [fol. 55] in the meantime and thus eliminate great and, we suggest, unnecessary duplication of effort on the part of all parties concerned. We respectfully ask, further, that this reply be accepted by the Court as a reply to the answer of California Electric Power Company.

Respectfully submitted, (S.) L. E. Blaisdell, Attorney for Mineral County.

Dated October 27th, 1951.

[fol. 56] AFFIDAVIT OF SERVICE

STATE OF NEVADA,
County of Mineral, ss.

DELLA SCHMIDT, being first duly sworn, deposes and says; That affiant is, and at all times herein mentioned was a citizen of the United States over the age of twenty-one years, and neither a party to nor interested in the above proceeding.

That on the 27th day of October, 1951, in the City of Hawthorne, County of Mineral, affiant personally deposited in the United States Mail copies of the within Reply to Answers to Petition for Review, addressed to the following attorneys:

Everett C. McKeage, Esquire,
c/o Public Utilities Commission
of the State of California,
San Francisco 2, California.

Henry W. Coil, Esquire,
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That the attorney for Mineral County has his office in the City of Hawthorne, County of Mineral. That there is a regular communication by mail between the City of Hawthorne, County of Mineral, State of Nevada, and City and County of San Francisco, California, and Riverside, California, respectively.

(S.) Della Schmidt.

Subscribed and sworn to before me this 27th day of October, 1951. (S.) J. J. Connelly, Notary Public, State of Nevada. My Commission expires: June 10, 1954. (Seal.)

[fol. 57] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE COUNTY OF MINERAL, STATE OF NEVADA, ETC.,

v.

THE PUBLIC UTILITIES COMMISSION, ETC., ET AL.

ORDER DENYING WRIT OF REVIEW—Filed January 21, 1952

Petition for writ of review Denied.

Gibson, C. J. Carter, J. and Spence, J., voting for issuance of a writ.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 58] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF REVIEW—Filed February 4, 1952

The County of Mineral, by its official counsel, L. E. Blaisdell, respectfully petitions this Honorable Court for rehearing of the court's denial of the petition for writ of review in the above entitled proceeding.

The denial of the writ leaves the order of the Public Utilities Commission, entered July 3, 1951, standing, and if the County's petition for the writ is not reheard by this Honorable Court, Mineral County will be left bound by the California Commission's order which is in direct conflict with the Federal Power Commission's earlier order of April 13, 1951. If the latter order is affirmed in the Court [fol. 59] of Appeals for the Ninth Circuit, review of which is pending, and in which the County is a party, the County will be subject to conflicting requirements, that is to say, it will be required to pay one rate under the California Commission's order and will be entitled to another rate under the Federal Power Commission's order, both of which are legal rates and legally binding on the County and must be charged and paid subject to penalty.

The California Commission by its order directs respondent company to charge to and collect from Mineral County one rate and if the Ninth Circuit affirms the Federal Power Commission's order entitling the County to a different rate both the respondent company and the County will be in a dilemma as to where jurisdiction rests. Further litigation may be required on problems arising from this situation, which will not arise if our prayer for a writ of review is granted and decision withheld pending determination of the issues in the Ninth Circuit.

Wherefore, the County of Mineral prays this Honorable Court to grant this petition and to let the writ of review issue, or that action hereunder be withheld until the Ninth Court of Appeals has rendered its decision in California

Electric Power Company vs. Federal Power Commission, No. 12987.

Dated February 1, 1952.

Respectfully submitted, (S.) L. E. Blaisdell, District Attorney and Attorney for Mineral County.

[fol. 60] *Duly sworn to by L. E. Blaisdell. Jurat omitted in printing.*

[fol. 61] AFFIDAVIT OF SERVICE

STATE OF NEVADA,
County of Mineral, ss.

ELIZABETH WILKINSON, being first duly sworn, deposes and says: That affiant is, and at all times herein mentioned was a citizen of the United States over the age of twenty-one years, and neither a party to nor interested in the above proceeding.

That on the 1st day of February, 1952, in the City of Washington, D. C., affiant personally deposited in the United States Mail copies of the within Petition for Rehearing, addressed to the following attorneys:

Everett C. McKeage, Esquire,
c/o Public Utilities Commission of the State of California,
San Francisco, 2, California.

Henry W. Coil, Esquire,
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That the attorney for Mineral County has his office in the City of Hawthorne, County of Mineral. That there is a regular communication by mail between the City of Hawthorne, County of Mineral, State of Nevada, and City and County of San Francisco, California, and Riverside, California, respectively,

as well as between Washington, D. C., and the City of San Francisco.

(S.) Elizabeth Wilkinson.

Subscribed and sworn to before me this 1st day of February, 1952. (S.) Wayne Birdsell, Notary Public, District of Columbia. My Commission expires April 14, 1953. (Seal.)

[fol. 62] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18464

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondent

ANSWER TO PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF REVIEW—Filed February 8, 1952

This Court on January 21, 1952, denied petitions for writ of review sought by the United States and Mineral County, Nevada, herein.

[fol. 63] The two petitioners have now served and filed in this Court petitions for rehearing, seeking that writs of review as originally prayed be granted and that the issues be determined "on the briefs and oral arguments," or in the alternative that "action on this petition for rehearing be withheld until the Court of Appeals for the Ninth Circuit has issued its opinion . . ."

Neither petitioner presents any sound reason for the relief prayed, nor any new matter. Each points to the decision of the California Public Utilities Commission as being in conflict with that of the Federal Power Commission and suggests that the utility California Electric Power Company may be faced with penalties or fines because of

ir ability to obey conflicting orders. No argument is made on the merits.

It is submitted that the petitions for rehearing reveal a misunderstanding of the law in a number of respects.

A. *Effect of Denial of Writ of Review*

In seeking a determination of the issues "on the briefs and oral arguments" and in suggesting that such course will obviate the "need for relitigating the issue as to jurisdiction," the petitioners evince ignorance of the effect of this Court's denial of a writ of review. Such denial constitutes an affirmance of the Commission's decision on the merits. As this Court stated in *Southern California Edi-* [fol. 64] *son Co.* v. *Railroad Commission* (1936), 6 Cal. 2d 737, at 748:

> "... it should be observed that under the State Constitution and the Public Utilities Act, the powers of this court in a proceeding to review an order or decision of the commission are not limited to the considerations incident to the writ of *certiorari* or review mentioned and provided for in section 4 of Article VI of the Constitution and sections 1067-1077 of the Code of Civil procedure."

Again, on page 756, this Court said:

> "... The denial of the petition for a writ of review in each case must be deemed a determination of the point ..."

In *Napa Valley Electric Co.* v. *Railroad Commission* (1920), 251 U. S. 366, 64 L. ed. 310, the United States Supreme Court said, in referring to the effect of a denial by the California Supreme Court of a writ to review an order of the Commission (251 U. S. at 373):

> "... absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented..."

To like effect is *Southern Pacific Co.* v. *Van Hoosear* (1934), 72 F. 2d 903.

B. *Concurrent Jurisdiction of California Supreme Court*

While petitioners do not expressly say so, they create the implication that this Court should be subservient to the determination of a federal administrative agency and should await the outcome of a federal court review of [fol. 65] such determination. As shown in our Answer to the Petitions for Writs of Review herein (pp. 26-28), state tribunals have equal jurisdiction with federal tribunals to construe federal law and determine whether that law allows concurrent jurisdiction in the state and federal tribunals, or whether it gives exclusive jurisdiction in the federal tribunal. To repeat the language of this Court in *Gerry of California* v. *Superior Court* (1948), 32 Cal. 2d 119, 122:

> "... Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it."

The prior institution of proceedings in a federal tribunal does not preclude the state tribunal from construing federal law to determine whether or not that law permits state jurisdiction.

> See *Grubb* v. *Public Utilities Commission* (1930), 281 U. S. 470, 74 L. ed. 972.

Indeed, in that case it was held that the decision of the state court, once final because of expiration of the period for appeal to the United States Supreme Court, estopped the appellant from further litigation in the federal court. [fol. 66] C. *Effect of Delay in Acting upon Petition for Rehearing*

As an alternative to the issuance of a writ of review, petitioners ask that action on the petition for rehearing be withheld until the Court of Appeals for the Ninth Circuit has issued its opinion in the cognate proceeding. Ap-

parently, petitioners are unfamiliar with this Court's Rule 27(e) which provides:

> "If no order [on petition for rehearing] is made before the decision becomes final, the petition shall be deemed denied."

Petitioners could hardly have intended to make the alternative request.

D. *Effect of California Supreme Court Decision Upon California Electric Power Company*

The United States argues that the petition for rehearing should be granted because the utility will otherwise be caught between conflicting orders, with the possibility of incurring fines and penalties. There are two answers. First, it is hardly befitting the United States to appropriate an argument which belongs to the utility only. Secondly, the record in the proceeding before the Court of Appeals, Ninth Circuit (No. 12987), reveals that a stay order was issued by that Court on August 29, 1951. The argument of the United States indicates that its counsel have not bothered to ascertain the state of the record.

[fol. 67]

Conclusion

In view of the foregoing, it is submitted that the petitions for rehearing should be denied.

Respectfully submitted, (S.) Everett C. McKeage, Boris H. Lakusta, Wilson E. Cline, Attorneys for the Public Utilities Commission of the State of California.

Dated: San Francisco, California, February 8, 1952.

[fol. 68] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18463

THE UNITED STATES OF AMERICA, Peitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondents

S. F. No. 18464

THE COUNTY OF MINERAL, STATE OF NEVADA, a political subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation, Respondent

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

GRACE E. HUNT, being first duly sworn, deposes and says:

That affiant is, and at all times herein mentioned was, a citizen of the United States over the age of twenty-one [fol. 69] years, and neither a party to nor interested in the above proceeding.

That on the 8th day of February, 1952, in the City and County of San Francisco, affiant personally deposited in the United States Mail copies of the within Answer to Petition for Rehearing of Denial of Petition for Writ of Review, addressed to the following attorneys:

Holmes Baldridge, Esq.,
Asst. Attorney General,
Department of Justice,
Washington 25, D. C.

L. E. Blaisdell, Esq.,
County District Attorney,
Hawthorne, Nevada.

Henry W. Coil, Esq.,
c/o California Electric Power Company,
Riverside, California.

That said copies were enclosed in sealed envelopes and all postage thereon fully prepaid. That attorneys for the Public Utilities Commission have their offices in the City and County of San Francisco. That there is a regular communication by mail between the City and County of San Francisco, California, and Washington, D. C., Hawthorne, Nevada, and Riverside, California, respectively.

(S.) Grace S. Hunt.

Subscribed and sworn to before me this 8th day of February, 1952. (S.) R. J. Pagalich, Secretary, Public Utilities Commission of the State of California. (Seal.)

[fol. 70] ORDER DUE FEBRUARY 20, 1952

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE COUNTY OF MINERAL, STATE OF NEVADA, ETC.,

v.

THE PUBLIC UTILITIES COMMISSION, ETC., ET AL.

ORDER DENYING REHEARING

Petition for rehearing Denied.

Gibson, C. J., Carter, J., & Spence, J., voting for a rehearing.

Gibson, Chief Justice.

Filed February 18, 1952, William I. Sullivan, Clerk, By R. J. Bell, S. F., Deputy. (Seal.)

[fol. 71] Clerk's Certificate to foregoing transcript

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1952.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 1st day of May, 1952.

[fol. 73] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 206

COUNTY OF MINERAL, NEVADA, a Political Subdivision of the State of Nevada, Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and the California Electric Power Company, a Corporation

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.